IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.288 OF 1996

Avinash Sitaram Garware,)
Occupation Talathi (Now suspended))
Sajja Kon, Taluka Bhiwandi, District)
Thane, R/o. Padmavatiprasad)
Society, Ground floor, Room No.2,)
Thankarpada, Kalyan, Taluka Kalyan,)
District Thane.) ... Appellant

Versus

State of Maharashtra.) ... Respondent

Mr. S.R. Chitnis, senior advocate i/b S.V. Kotwal for the appellant.

Ms. V.R. Bhosale, A.P.P. for the State.

CORAM : SMT. RANJANA DESAI, J.

DATE ON WHICH THE JUDGMENT RESERVED : 17TH SEPTEMBER, 2007.

DATE ON WHICH THE JUDGMENT PRONOUNCED : 2ND NOVEMBER, 2007.

JUDGMENT:-

1. The appellant (for the sake of brevity, “the accused”) was tried in the court of Special Judge, Thane in Special Case No.13 of

1999 for offences punishable under sections 7, 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, 1988 (for short, “the said Act”). By the impugned judgment and order dated 14/5/1996 the learned Special Judge convicted the accused for the offence punishable under section 7 of the said Act and sentenced him to suffer RI for one year and to pay a fine of Rs.500/-, in default, to suffer further RI for three months. The accused was also convicted for offences punishable under section 13(1)(d) read with section 13(2) of the said Act and sentenced to suffer RI for one year and to pay a fine of Rs.500/-, in default, to suffer RI for further three months. Substantive sentences for both the offences were ordered to run concurrently. Being aggrieved by the said judgment and order, the accused has preferred this appeal.

2. It would be advantageous to begin with the gist of the prosecution story as evident from the evidence of PW-1 Prakash Patil, the evidence of PW-2 Ganesh Waghchoure and PW-4 PI Kedu Devde. Admittedly, in the year 1999, the accused was Talathi of Village Kon, Taluka Bhiwandi, District Thane. The complainant PW-1 Prakash Patil is an agriculturist by profession. He owns land bearing Survey No.71, Hissa No.1, Survey No.75, Hissa No.2 and

Survey No.78 at Bhayander which was subsequently disposed of by him in the year 1991. After selling the land situate in Bhayander, he purchased 26 gunthas of land of Maruti Vithu Patil out of Survey Nos.7/4, 7/5, 18/3 and 18/4 of Village Kon for Rs.58,000/- by registered Sale Deed dated 7/2/1991. After the Sale Deed was registered with the Sub-Registrar, Bhiwandi, PW-1 Prakash Patil went to the place of the accused in the month of March, 1991 for getting the land mutated in his name. The accused told him that he will have to pay money for that work. PW-1 Prakash Patil again went to the office of the accused on 9/3/1991 and 10/3/1991 but the accused was not available. On 3/7/1991, he went to the house of the accused and demanded 7/12 extract and a certified copy of the mutation in respect of the newly purchased land. According to PW-1 Prakash Patil, the accused told him to come with Rs.500/- on 5/7/1991 to his house for 7/12 extract.

3. On 4/7/1991, PW-1 Prakash Patil went to the office of the Anti Corruption Bureau at Thane (for convenience, “the ACB, Thane”) and lodged his complaint (Ex-10). PW-4 the Investigating Officer PI Devde wrote a letter (Ex-22) to the RTO, Thane to requisition services of two clerks to act as panchas. Pursuant to

that letter, the RTO, Thane made two clerks available to act as panchas. They are Vasant Sawant and PW-2 Ganesh Waghchoure. Both the panchas and the complainant were asked by PW-4 PI Devde to come to the office of the ACB, Thane at 5.00 a.m. on the next day morning. On 5/7/1991, at 5.00 a.m., both the panchas and the complainant arrived. They were introduced to PW-1 Prakash Patil. They were made to read the complaint. After reading the complaint, they put their signatures on the complaint. PW-4 PI Devde asked both the panchas to take physical search of PW-1 Prakash Patil. On search, PW-1 Prakash Patil was found having Rs.557/- on his person. Out of that amount, PW-1 Prakash Patil handed over Rs.500/- to PW-4 PI Devde. There were five notes of Rs.100/- denomination each. Numbers of the five currency notes were noted in the panchnama. Then ASI Dixit gave demonstration to the complainant and panchas about the use of anthracene powder. Anthracene powder was applied to the currency notes. The marked notes were folded and put into the left side shirt pocket of PW-1 Prakash Patil. PW-1 Prakash Patil was instructed to accompany the panchas to the place of the accused. PW-1 Prakash Patil was told that if the accused enquires about the identity of PW-2 Waghchoure, he should be introduced as

prospective purchaser of his land. PW-1 Prakash Patil was instructed to ask for 7/12 extract and certified copy of mutation entry from the accused. He was told that if the money is demanded he should hand over the marked currency notes to the accused. He was told to give signal to the raiding party on acceptance of the money by holding right sleeve of his shirt up to the elbow joint while coming out of the room of the accused. PW-2 Waghchoure was asked to hear the talk between PW-1 Prakash Patil and the accused. PI Khaire was asked by PW-4 PI Devde to accompany PW-1 Prakash Patil and see that after acceptance of money, it was not destroyed by the accused. PI Khaire was also instructed to pose as one of the prospective purchasers of the land of the complainant. Pancha Vasant Sawant was also instructed to accompany the raiding party. Pre-trap panchnama was drawn between 5.30 a.m. and 6.45 a.m. It is at Ex-14.

4. On 5/7/1991 at about 7.20 a.m., PW-4 PI Devde and PW-1 Prakash Patil, PW-2 Waghchoure, pancha Sawant, PI Khaire and other members of the raiding party left the office of the ACB, Thane and reached Lal Chowky, Kalyan at about 8.10 a.m. The vehicle was halted by the road side. PW-1 Prakash Patil, PW-2

Waghchoure and PI Khaire went towards the house of the accused in front of Room No.2 of Padmavati Prasad Society. They were followed by PW-4 PI Devde and other raiding party by keeping some distance. After sometime, PW-1 Prakash Patil, PW-2 Waghchoure and PI Khaire went to the room of the accused. The accused was present in his house. He asked PW-1 Prakash Patil, PI Khaire and PW-2 Waghchoure to sit. PW-1 introduced PW-2 Waghchoure and PI Khaire to the accused as intending purchasers of his land. He asked the accused to furnish 7/12 extract at the earliest. The accused demanded money. The accused accepted the money and put it below the bed. The accused told him that he would give 7/12 extract on Monday i.e. on 8/7/1991. Thereafter PW-1 Prakash Patil went out of the house and gave signal to the raiding party. The members of the raiding party rushed into the house of the accused. PW-1 Prakash Patil waited outside the room.

5. PW-4 PI Devde introduced himself and both the panchas to the accused. PI Khaire was holding both the wrists of the accused. He was also introduced to the accused. The accused told PW-4 PI Devde that he had not demanded money from PW-1 Prakash Patil

and he had accepted the same because PW-1 Prakash Patil gave it to him. PW-4 PI Devde asked the accused where he had kept the amount. The accused told him that he had kept it below the bed. Thereafter, the hands of the accused were examined in ultra violate rays. Traces of anthracene powder were noticed on his hand. Similarly, on his face, anthracene powder was seen. The place below the bed where the tainted money was kept by the accused was examined. in the ultra violate rays. Anthracene powder was noticed there also. Five notes of Rs.100/- denomination each were found below the bed. Traces of anthracene powder were seen on those notes. Numbers of those notes tallied with the numbers of notes noted in the panchnama. Thereafter, PW-1 Prakash Patil was called inside the room. His hands were examined in the ultra violate rays. Anthracene powder was seen on his palm and fingers. The accused was asked to produce the documents with regard to the land of PW-1 Prakash Patil. The accused handed over the file to him. From the file, xerox copy of Sale Deed executed by Maruti in favour of PW-1 Prakash Patil, 7/12 extracts of land of PW-1 Prakash Patil and a notice issued by the accused to the original land owner and a notice issued by the competent authority under Urban Land Ceiling

Act to Maruti Patil were attached. Personal diary of the accused was also attached. Post-trap panchnama was recorded from 8.45 a.m. to 12.10 p.m. It is at Ex-15.

6. Thereafter, the raiding party proceeded to the village of the accused along with the accused. The office of the accused situated at Village Kon was closed. He was asked to open the office. On opening the office by the accused, he was asked to furnish the relevant documents. He furnished four 7/12 extracts which came to be attached. Panchnama Ex-16 was prepared from 13.00 hours to 13.45 hours in respect of the same. PW-4 PI Devde then went to Bazar Peth Police Station, Kalyan and lodged his complaint which is at Ex-26. On completion of investigation, sanction to prosecute the accused was obtained. The accused was then charged as aforesaid.

7. The accused pleaded not guilty to the charge and claimed to be tried.

8. In support of its case, the prosecution examined four witnesses. The prosecution examined PW-4 Prakash Patil, the

complainant, PW-2 Waghchoure, the pancha witness, PW-3 Subhash Dumbre, the Sub-Divisional Officer, Bhivandi and PW-4 PI Devde.

9. According to the accused, he did not accept the illegal gratification from PW-1 Prakash Patil. The amount of Rs.500/- was accepted by him from PW-1 Prakash Patil for investing it in Small Savings. The accused, however, did not examine any witness in support of his defence.

10. After perusing the evidence on record, the learned Sessions Judge came to a conclusion that the prosecution had proved its case beyond reasonable doubt. He, therefore, convicted the accused as aforesaid and, hence, this appeal.

11. I have heard Mr. Chitnis, learned senior counsel appearing for the accused and Ms. Bhosale, learned A.P.P. representing the State. With the help of counsel for the parties, I have carefully perused the evidence and the relevant record.

12. Mr. Chitnis, learned senior counsel appearing for the accused

contended that the impugned judgment and order is perverse and deserves to be set aside. He pointed out that the learned Judge has held that the alleged demand made in March, 1991 is not proved. After recording this finding, learned Judge should have gone on to hold that demand allegedly made on 3/7/1991 is also not proved because PW-1 Prakash Patil cannot be called a reliable witness.

13. Mr. Chitnis drew my attention to the statement of the accused recorded under section 313 of the Criminal Procedure Code (for short, “the Code”) in which the accused has stated that he took Rs.500/- from the complainant for investing in Small Savings. Mr. Chitnis submitted that the case of the accused that as a Talathi, he was to encourage people to invest money in Small Savings and therefore he took money from the accused is supported by the evidence of PW-3 Subhash Dumbre, the Sub-Divisional Officer, Bhivandi. Mr. Chitnis contended that the genuine nature of the defence of the accused is evident from the fact that in complaint dated 4/7/1991, PW-1 Prakash Patil has stated that the accused had not told him to invest money in Small Savings. Mr. Chitnis submitted that there was no reason for the accused to refer to

Small Savings in his complaint. According to Mr. Chitnis, this indicates that the money was really taken for investing in Small Savings and expecting that the accused would come out with the true story, PW-1 Prakash Patil has created a background in the complaint.

14. Mr. Chitnis submitted that section 7 of the said Act makes taking gratification other than legal remuneration in respect of an official act by public servant, an offence. Mr. Chitnis submitted that section 20 of the said Act says that where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13, it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward without consideration or for a consideration which he knows to be inadequate. Mr. Chitnis submitted that the words “other than legal remuneration” are important. In this case, the

accused had accepted money for investing it in Small Savings. He had accepted it as legal remuneration for the Government for investment in National Saving Scheme. Therefore, presumption under section 20 cannot arise. Mr. Chitnis submitted that the sanctioning authority failed to notice this important aspect. He submitted that the sanctioning authority has not appreciated that Talathies had to induce people to invest in Small Savings and, therefore, this is not a case where the accused had accepted illegal gratification. The sanction is granted without noticing this vital aspect and, therefore, it is bad in law.

15. Mr. Chitnis submitted that assuming that as per section 20 of the said Act, burden has shifted to the accused, the accused has discharged that burden. He has probabalised his defence. He has rebutted the presumption. Mr. Chitnis submitted that PW-4 PI Devde has stated in his cross-examination that after the post-trap panchnama, the accused had told him that he had accepted money for investing it in National Saving Scheme and he had recorded the statement of Nayab Tahsildar to ascertain whether the job of collecting the money for National Saving Scheme was assigned to the accused. Mr. Chitnis submitted that if Nayab Tahsildar's

statement was recorded, it was necessary for the prosecution to examine him particularly when the accused had come out with a defence that he had collected the money for investing it in National Saving Scheme. According to Mr. Chitnis, adverse inference needs to be drawn against the prosecution. Mr. Chitnis relied on the judgment of this court in ***Kishan Khashapa Gogawale v. The State of Maharashtra 1994 (4) Bom.C.R. 399*** where a somewhat similar defence was accepted by this court.

16. Mr. Chitnis further submitted that PW-2 Waghchoure, the panch witness is a habitual pancha. He has admitted in his evidence that on earlier occasions also, he had acted as a pancha in trap cases. The evidence of this witness, therefore, cannot be relied upon. In this connection, he relied on the judgment of the Supreme Court in ***State of Gujarat Through CBI v. Kumudchandra Pranjivan Shah, 1997 SCC (Cri.) 750***.

17. Mr. Chitnis then contended that admittedly PI Khaire accompanied the raiding party to the office of the accused. He submitted that this fact is admitted by PW-4 PI Devde. PW-4 PI

Devde has said that he had asked PI Khaire to accompany PW-1 Prakash Patil. He had instructed him to pose as one of the prospective purchasers of the land and see that after acceptance of the bribe money by the accused, it was not destroyed. Mr. Chitnis submitted that therefore, the demand allegedly made by the accused before PI Kaire is not admissible in evidence as it is in the nature of statement made to the police officer and is hit by section 162 of the Criminal Procedure Code and section 25 of the Indian Evidence Act. In this connection, Mr. Chitnis relied on the judgments of the Supreme Court in ***Ramkishan Mithanlal Sharma v. The State of Bombay, 1954 SC Vol. LVII Bom.L.R. 600 (Lloyds Bank's case, for short) and Bheru Singh s/o. Kalyan Singh v. State of Rajasthan (1994) 2 SCC 467***.

18. Mr. Chitnis submitted that in any case, the prosecution ought to have examined PI Khaire. Non examination of PI Khaire makes the prosecution story suspect. Mr. Chitnis then submitted that PW-4 PI Devde had lodged a complaint against the accused. He is interested in the success of the complaint. He should not have, therefore, been entrusted with the task of conducting the

investigation. In this connection, Mr. Chitnis relied on the judgment of this court in ***Tryambak Lilaji Binnar v. State of Maharashtra, 2002 Cri. L.J. 3059***. Mr. Chitnis submitted that in the circumstances the impugned judgment and order deserves to be set aside.

19. As against this, Mrs. Bhosale, learned A.P.P. appearing for the State submitted that the impugned judgment and order does not merit any interference. She submitted that the evidence of PW-1 Prakash Patil is corroborated by the evidence of PW-2 Waghchoure and the evidence of the Investigating Officer PW-4 PI Devde. She submitted that PI Khaire was not part of the investigating team. He was just sent with the raiding party to ensure that the accused does not destroy the money after accepting it. Therefore, the statement made before him cannot be excluded from the evidence. Since he was not concerned with the investigation, he has not been examined by the prosecution. She submitted that therefore, adverse inference cannot be drawn because he is not examined. In support of her contention that the statement made before PI Khaire is not inadmissible in evidence,

Mrs. Bhosale relied on the judgments of the Supreme Court in ***Ramesh Chandra Mehta v. The State of West Bengal, AIR 1970 SC 940, Raj Kumar Karwal v. Union of India & Ors. AIR 1991 SC 45*** *and* ***State of Gujarat v. Anirudhsing and Anr. (1997) 6 SCC 514***. Mrs. Bhosale submitted that from the evidence of PW-1 Prakash Patil, PW-2 Waghchoure and PW-4 PI Devde, it is clear that the accused was concerned with mutation of the name of PW-1 Prakash Patil in the revenue record. She submitted that the panchnama (Ex-16) which pertains to attachment of documents from the office of the accused indicates that from the office of the accused, no documents pertaining to National Saving Scheme were attached. However, papers pertaining to mutation entries concerning PW-1 Prakash Patil were recovered from his office. This indicates that the defence of the accused is palpably false. Mrs. Bhosale submitted that the prosecution has established its case beyond reasonable doubt and the appeal be dismissed.

20. I shall first analyse the evidence which pertains to the alleged demands made prior to 3/7/1991. PW-1 Prakash Patil has stated in his evidence that he had gone to the place of the accused in the

month of March, 1991 to get the land mutated in his name as per sale deed dated 7/2/1991. According to him, the accused told him that he will have to pay him money for getting the land mutated in his name. He told him that he had no money. In his complaint (Ex-21) however, he has stated that in March, 1991, he had gone to the accused for 7/12 extract but the accused told him that the work cannot be done immediately and that he should come later. He has not stated, at that stage, that the accused demanded Rs.500/- from him.

21. In the complaint, he has stated that on 3/5/1991, he met the accused in his office at 10.30 a.m. for mutation entry and 7/12 extract. According to him, the accused told him that unless he pays Rs.500/-, his work will not be done. In his evidence, in the court, however, he has not referred to this visit at all. In his evidence, he had stated that he had gone to the office of the accused on 9th and 10th of March, but the accused was not available. This is absent in his complaint. Therefore, there is variance in the averments made in the complaint and the deposition of PW-1 Prakash Patil in the court as regards the first demand. Learned Special Judge has also observed that there is

discrepancy about the visit of PW-1 Prakash Patil to the office of the accused prior to 3/7/1991. On this aspect, I concur with learned Special Judge. I have no hesitation in observing that the alleged demand made prior to 3/7/1991 is not proved.

22. Once the prior demand is not proved, the rest of the prosecution case regarding money allegedly demanded by the accused on 3/7/1991 is concerned, it will have to be read with great caution and circumspection. Evidence of PW-1 Prakash Patil indicates that he was instructed to accompany PI Khaire and PW-2 Waghchoure to the house of the accused. He has said that PI Khaire and PW-2 Waghchoure went inside the house of the accused and he introduced PI Khaire and PW-2 Waghchoure to the accused as intending purchasers of his land. The accused demanded money. He has stated that PI Khaire sat on his side in the house of the accused. According to him when he asked for 7/12 extracts, the accused demanded money for it. Thus demand for money was made by the accused in front of PI Khaire.

23. PW-2 Waghchoure has stated that PW-4 PI Devde instructed him to accompany PW-1 Prakash Patil to the place of

the accused and asked him to pretend to be a prospective purchaser of the land if inquired by the accused. He has further stated that PI Khaire was instructed by PW-4 PI Devde to see that after acceptance of money by the accused, it is not destroyed by him. He has further stated that he along with PI Khaire and PW-1 Prakash Patil left the office of ACB for proceeding towards the place of the accused in a van. The van halted at a distance of 3 furlong from the house of the accused. Then, he, PI Khaire and PW-1 Prakash Patil went inside the house of the accused. PI Khaire sat on the right side of the cot. PW-1 Prakash Patil then introduced PW-2 Waghchoure and PI Khaire to the accused as prospective purchasers of his land and requested for the documents. The accused then inquired about PI Khaire and PW-2 Waghchoure told him that he was one of his workers. PW-1 Prakash Patil again insisted for 7/12 extract and mutation entry. Thereupon, the accused told him that after he gets money, he would supply the documents to him by Monday or Tuesday. PW-1 Prakash Patil then paid an amount of Rs.500/- to the accused which the accused kept under his bed. The accused told him to collect the documents on Monday or Tuesday. Thereafter, PW-1 Prakash Patil went outside and gave the agreed signal to the

raiding party. PW-2 Waghchoure and PI Khaire remained in the room. According to PW-2 Waghchoure thereafter, PI Khaire disclosed their real identity to the accused and caught hold of both the wrists of the accused. By the time, PW-4 PI Devde and the raiding staff entered the room of the accused. After the post-trap panchnama was drawn, both the panchas, PW-4 PI Devde, PI Khaire and members of the raiding party left the place of the accused for Talathi's office at Kongaon. The accused gave key of the office to PW-4 PI Devde. Office of the accused was opened and relevant documents were taken charge of under panchanama (Ex-16).

24. PW-4 PI Devde has stated in his evidence that he had asked PI Khaire to accompany PW-1 Prakash Patil to see that after acceptance of money by the accused, it was not destroyed. He had instructed PI Khaire to pose as one of the prospective purchasers of the land. He has confirmed that PW-1 Prakash Patil, PW-2 Waghchoure and PI Khaire went to the room of the accused. He has stated that when PW-1 Prakash Patil gave the agreed signal, he and the raiding party entered the room of the accused. PW-1 Prakash Patil was asked to wait outside the room

of the accused. When they entered the room, PI Khaire was holding both the wrists of the accused. He introduced himself and both the panchas to the accused. PI Khaire was also introduced to the accused. In the cross-examination, he has stated that PW-2 Waghchoure and PI Khaire narrated the happenings that took place since the time of entering the room of the accused which were recorded by him by preparing panchanama then and there, which lasted from 8.45 a.m. to 12.10 p.m. It appears that the statement of PI Khaire was recorded. However, PI Khaire was not examined as a witness.

25. In my opinion to prove its case beyond reasonable doubt and meet the defence case that PI Khaire being a police officer, statements made before him are inadmissible in evidence, prosecution should have examined PI Khaire. To rule out the possibility of statement of the accused having been extracted by improper means, PI Khaire whose statement was recorded ought to have been examined. Non-examination of PI Khaire has adversely affected the prosecution case. It has cast a shadow of doubt on the prosecution case. According to PI Devde he had asked PI Khaire to assist him in ensuring that the accused does not

destroy the money accepted him as illegal gratification. It is the case of the prosecution as deposed by witnesses that PI Khaire caught hold of the wrists of the accused. PI Devde has stated that after entering the room he introduced PI Khaire to the accused. What is most pertinent to note is that according to PI Devde, PI Khaire and PW-2 Waghchoure narrated the incident which took place after they entered the room of the accused and he recorded it in the post-trap panchnama. According to him, post-trap panchnama lasted from 8.45 a.m. to 12.10 p.m. That means the recording of panchnama went on for about four hours. Therefore, panchnama giving meticulous details was prepared on the basis of information given by PI Khaire. Besides, thereafter, PI Khaire accompanied PI Devde to Talathi's office from where under panchnama certain documents are said to have been recovered. In such circumstances, when the police had recorded the statement of PI Khaire, the prosecution ought to have examined him so that the accused could have cross-examined him. In my opinion, in the peculiar facts and circumstances of the case when the pancha witness has admitted that he had earlier acted as a pancha for the prosecution, the prosecution should have examined PI Khaire to lend much needed corroboration to the evidence of

PW-1 Prakash Patil. This is more so because the alleged demand made prior to 3/7/1991 has not been proved by the prosecution.

26. It is well established that in cases where a person is charged with offences under the said Act, he is required to refute the presumption of guilt contained in the said Act but the burden on him is not heavy. He has not to establish his defence beyond reasonable doubt. He may rebut the presumption by showing a mere preponderance of probability in his favour. (***Trilok Chand Jain v. State of Delhi, AIR 1977 SC 666***.)

27. In a situation like the present, where prior demand is not proved and the most relevant witness is not examined, the defence of the accused will get probabalized. It is true that in criminal cases it is difficult and not always advisable to contend that the ratio of a particular judgment is applicable to the case on hand because factual matrix of criminal cases widely differ. Yet reference can be made to the judgment of this court in ***Kishan' s case (supra)*** on which Mr. Chitnis has placed reliance, because in

that case also the accused was a Talathi and somewhat similar defence was taken. This court found that the prosecution evidence about the demand for illegal gratification was not proved. This court observed that by preponderance of probabilities the law envisages that the cardinal maxim of criminal jurisprudence lays down that where two explanations are possible, the one in favour of the accused must be accepted. It was further observed that basic presumption of innocence is not done away in corruption cases and the presumption provided under the said Act is a rebuttable one. This court held that the accused had probabalized the defence and acquitted the accused.

28. In this case, PI Devde has stated that he had recorded the statement of Naib Tahsildar to ascertain whether the accused was assigned the job of collecting money for National Saving Scheme. However, Naib Tahsildar is not examined by the prosecution. PW-3 Subhash Dumbre, the Sub-Divisional Officer, Bhiwandi has stated in his evidence that target is given to the Talathies to induce and encourage public to invest in small savings and National Savings Certificates. If the prosecution evidence about the prior demand is held not proved and if it is found that there is no

independent corroboration to the alleged demand made on 3/7/1991 because PW-2 Waghchoure has admittedly acted as a pancha for the prosecution in the past and when PI Khaire an important witness has not been examined, the explanation offered by the accused gets probabalized and will have to be accepted. In the circumstances, the impugned judgment and order will have to be set aside.

29. However, I must note that I am unable to accept Mr. Chitnis's contention that in all circumstances, statement made by an accused before any police officer is hit by section 162 of the Code or section 25 of the Evidence Act. That by itself will not make the statement inadmissible in evidence and I may not be understood to have laid down such law.

30. In ***Vishnu Belurkar & Anr. v. State of Maharashtra, 1975 Cri.L.J. 517***, the Full Bench of this court was, inter alia, considering whether contents of post-trap panchnama are hit by section 162 of the Code as it is prepared by a police officer and, if yes, to what extent. It is necessary to refer to this judgment as it analyses the

relevant section of the Code on which Mr. Chitnis has placed reliance and also discusses ***Lloyd Bank's case (supra)*** relied upon by Mr. Chitnis and distinguishes it.

31. After referring to Justice Beaumant's judgment in ***Emperor v. Mohanlal 43 BLR 163***, the Full Bench clarified that the essential purpose of making panchnamas is to make a record of things which occur in the presence of panchas and which are seen and heard by them and the purpose is never to convey or impart knowledge to the police officer about the things which are seen or heard by them: the secondary purpose which is served by these panchnamas is that such record should serve as aid memoir to the panchas when they enter the witness-box in the court at the time of the trial and depose about things which they had seen and heard and such record, having been made contemporaneously at about the time when the panchas had seen and heard the things, also serves the purpose of corroborating their evidence given at the trial. The use of such contemporary record, being in the nature of previous statement made by the panch, for corroborating the evidence of the panch is perfectly valid under section 157 of the

Evidence Act.

32. The Full Bench then considered whether the fact that such record is scribed by the police officer investigating the offence or by a constable working under him during the course of such investigation converts such record into statements made by the panch to the police officer within the meaning of section 162 of the Code because unless it amounts to statement made by the panch to the police officer within the meaning of section 162 of the Code, it would not fall within the ban contained therein. Full Bench then referred to section 157 of the Evidence Act which states that in order to corroborate the testimony of the witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved. It was observed that section 157 of the Evidence Act is controlled by section 162 of the Code and if the statements though falling under section 157 of the Evidence Act, were also to fall under section 162 of the Code, such statements would become inadmissible and could be made use of only for the purpose mentioned in the proviso to section 162 of the Code. The Full Bench observed that

the expression “statement” occurring in section 162 of the Code must mean “narration”. The Full Bench then referred to the judgment of the Full Bench of Allahabad High Court in ***Shyamlal Sharma v. King Emporor AIR 1949 All 483*** which states that a statement made to one person would connote the idea that the narration implies an animus or intention to communicate the subject matter of the statement to such person. It was then observed that section 161 of the Code empowers any police officer making an investigation under Chapter XIV to examine orally any person supposed to be acquainted with the facts and circumstances of the case and and it is in regard to the examination of such person and the consequential narration or a record thereof, if made by the police officer during the course of investigation done under that chapter that, the ban contemplated under section 162(1) has been imposed. It was further observed that in order that the previous statement of a witness which would ordinarily fall within section 157 of the Evidence Act should also fall under section 162 of the Code, two conditions are required to be fulfilled - (a) that it must be a statement made to the police officer and (b) that it must have been made in the course of investigation

under chapter XIV of the Code.

33. The Full Bench then tackled the question whether recitals made in the post-trap panchnama would constitute statements of the panchas to the police officer. The Full Bench observed that having regard to the primary and essential purpose for which panchnamas are made during the course of investigation of an offence, it is not possible to come to the conclusion that there is an element of communication, that is to say, there is an intention to communicate to the police officer the subject matter of the things seen and heard by the panchas which are recorded in the panchnama. The Full Bench clarified that there is a clear distinction between a narration made to the police officer with a view to communicate or impart knowledge of the subject matter of such narration to the police officer and mere record of what panchas have seen and heard which is intended to serve as aid memoir to the panchas when they give evidence at the trial.

34. The Full Bench observed that post-trap panchnama also contains events that happen after the arrival of the police officer namely, disclosure of the identity of the police officer and the

explanation of the accused as regards the currency notes found with him.

35. The Full Bench observed that so far as the things that transpire after the arrival of and in the presence of the police officer are concerned, these things cannot be said to be recorded with a view to communicating or imparting knowledge thereof to the police officer but it is essentially done for the purpose of recording what the panchas have seen and heard after the arrival of police, the record being intended to serve as aid memoir to panchas when they give evidence at the trial.

36. The Full Bench then observed that it is quite conceivable and it does happen that after disclosing identity when the investigating officer interrogates the accused and calls upon him to produce the bribe amount allegedly accepted, the statements made by the accused by way of replying to the investigation would obviously be statements made to the police officer and would be hit by the ban contained in section 162 of the Code. But it is equally conceivable that upon apprehension, the accused might exhibit some involuntary reaction which not being addressed to the police officer

and not intended as any communications to the police officer would not fall within the mischief of section 162 and would become admissible in evidence. The Full Bench clarified that it will be a question of fact to be decided by the court having regard to all the material on record whether what the accused does or utters upon apprehension, falls within the former category or latter category. The Full Bench clarified that barring statement which would amount to communications made to the police officer in reply to interrogation by him, if any, the rest of the recitals in the post-trap panchnama would be admissible and not hit by the ban of section 162 of the Code.

37. The above observations of the Full Bench can be applied to the facts of this case. If the prosecution case is to be accepted that PI Khaire was not the officer concerned with the investigation and he was there to assist the raiding team and was like any other witness, then statements made before him will be outside the purview of section 162 of the Code. For section 162 to come into operate, the statement must be made to a police officer who is investigating the case and must be made during the course of investigation. If the prosecution case that PI Khaire is not the

investigating officer is true, the first condition is not fulfilled. Assuming that investigation had started, as stated by the Full Bench, for section 162 to come into operate, the statement made by the person must be intended to be communicated to the police officer who is investigating the offence in question. Statement was not made by the accused with a view to communicate or impart knowledge of the subject matter of narration to the police officer. Merely because a police officer unconcerned with the case and investigation is standing by the accused when the statement is made, it would not be hit by section 162 of the Code. In a given case, if after the investigating officer discloses his identity, the accused offers explanation that may have to be excluded. But in another case, even after the identity is disclosed, if the accused indulges in utterances not intended as any communication to the police officer that would again not fall within the mischief of section 162 of the Code. As stated by the Full Bench that would be a question of fact. In this case, according to the prosecution, PI Khaire was not the police officer concerned with the investigation. Prior to arrival of PI Devde, the accused did not know that PI Khaire was a police officer because he was introduced to the accused as a prospective purchaser. If this is accepted, the

statements made in presence of PI Khaire not intended to be communicated to him as officer in charge of investigation would not be hit by section 162 of the Code.

38. It is also necessary to refer to the judgment of the Supreme Court in ***Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1954 SC 322*** on which the Full Bench has placed reliance. The question which arose in that case was whether the statements made to persons assisting the police were hit by section 162 or section 164 of the Code. The Additional District Magistrate was a part of the raiding party. The Supreme Court held that if the intention to record the statements was not to avoid ban of section 162 or section 164 but they were recorded out of greater caution, they would become admissible. Referring to this judgment, the Full Bench observed that mere presence of the police officer when the statements were made by the accused to the panch witness would not make any difference. If the panchnama is really the record of what the panchas had seen and heard and not a colourable pretence to avoid bar of section 162, the panchas could depose about what the accused had said before them at the trial. The

Supreme Court further observed that every statement made to a person assisting the police during an investigation cannot be treated as a statement made to the police or to the Magistrate and such a statement is not excluded from section 162 or section 164 of the Code. The question is of fact and has got to be determined having regard to the circumstances of each case.

39. In ***Lloyds Bank' scase (supra),*** cited by Mr. Chitnis, the Supreme Court while dealing with identification parade evidence held that the statements made by the identifiers cannot be held to be statements made to the pancha witnesses because that would result in circumventing section 162 of the Code by formally asking the pancha witnesses to remain present and contend that the statements, if any, made by the identifying witnesses were made to the pancha witnesses and not to the police officers. The Full Bench rightly distinguished that judgment by observing that there the Supreme Court was dealing with identification parade which was held by and under the supervision of police and panchas had played a very minor role and the practice of holding identification parade by the police had been given up by the police since that

decision. It is, therefore, not necessary for me to discuss the said judgment.

40. In this connection, I may refer to the judgment of the Patna High Court in ***S. Satyanarayana v. Emperor, AIR (31) 1944 Pat. 67***. In that case, the statements made by the accused to the Board of Inquiry consisting of Railway Officials in the presence of Sub-Inspector of Police, who was investigating the criminal case were sought to be kept out of consideration as being hit by section 162 of the Code. The Patna High Court observed that the object of section 162 is to ensure that it should not be open to the police in a criminal prosecution to give evidence of admissions which were either not in fact made or obtained by improper means. It was further observed that where the fact of the making of the statement is proved not by a policeman but two responsible railway officials and it is clear from their evidence that no improper means were used to obtain the statements, the mere fact that the Sub Inspector of Police was present when the statements were made is quite insufficient to bring in section 162 of the Code, the statement being not made to him but in his presence to the Board of Inquiry

consisting of railway officials. The statements made in such inquiry were held to be admissible in evidence.

41. Mr. Chitnis submitted that PI Khaire is a police officer who has power to investigate commission of a cognizable offence and, hence, statement made before him is hit by section 25 of the Evidence Act.

42. In ***State of Punjab v. Barkat Ram, AIR 1962 SC 276,*** the Supreme Court has discussed who is a "police officer" within the meaning of section 25 of the Evidence Act. The relevant observations of the Supreme Court may be quoted.

> *"An officer, by whatever designation he is called, on whom a statute substantially confers the powers and imposes the duties of the police is a police officer within the meaning of S.25 of the Evidence Act".*

43. In ***Raj Kumar Karwal's case (supra),*** the Supreme Court has discussed the relevant provisions of the Code and observed as

under :

> *"The power to investigate is to be found in Chapter XII of the Code which begins with section 154 and ends with Section 176. The scheme of this Chapter is that the law can be set in motion in regard to a cognizable offence on receipt of information, written or oral, by the officer-in-charge of a police station. Once such information is received and registered, Section 156 empowers any officer-in-charge of the police station to investigate the same without any magisterial orders. The investigation which so commences must be concluded, without unnecessary delay, by the submission of a report under Section 173 of the Code to the concerned Magistrate in the prescribed form. Any person on whom power to investigate under Chapter XII is conferred can be said to be a "police officer", no matter by what name he is called. The nomenclature is not important, the content of the power he exercises is the determinative factor. The important attribute of police power is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet under Sec. 173 of the Code."*

44. According to learned A.P.P. PI Khaire was not the officer in charge of the concerned police station on whom power to investigate was conferred. He was not to complete the investigation and file the charge-sheet. He was not concerned with investigation and, hence, in the light of the above judgment, the

statements made before him would not be, therefore, hit by section 25 of the Evidence Act. If PI Khaire is, in fact, not concerned with the investigation, this submission will hold the field. In the view that I have taken, it is not necessary for me to consider whether if demand for money allegedly made by the accused is treated as an incriminating statement, it would amount to confession of guilt.

45. Having come to the conclusion that the demand made prior to 3/7/1991 is not proved; that there is no corroboration to the vidence of PW-1 Prakash Patil and to the evidence of PW-2 Waghchoure, the pancha who had earlier acted as a pancha; that non-examination of PI Khaire has cast a shadow of doubt on the prosecution case and that in the circumstances of the case, defence of the accused is probabalised the impugned order of conviction and sentence will have to be set aside. The prosecution ought to have examined PI Khaire to dispel all doubts that PI Khaire was associated with the investigation and that any statement was extracted from the accused by improper means. The defence should have been given an opportunity to cross-examine him. This circumstance has made an irreversible dent in

the prosecution case. Hence, the following order:

46. The impugned judgment and order dated 14/5/1996 passed by the Special Judge, Thane in Special Case No.13 of 1999 is quashed and set aside. The appellant/accused - Avinash Sitaram Garware is acquitted of the offences punishable under sections 7, 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, 1988. He is on bail. He need not surrender. His bail bond stands cancelled.

(SMT. RANJANA DESAI, J.)